Supreme Court, U.S.
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No. 98-1337

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

FRANK WAGNER,

Petitioner,

v.

JAMES P. CELEBREZZE, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT JUDGE JAMES P. CELEBREZZE

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QUESTIONS PRESENTED FOR REVIEW

1. Did the district court and court of appeals correctly analyze plaintiff-petitioner's employment claim under the political patronage framework of *Branti v. Finkel*, 445 U.S. 507 (1980), and its progeny?

2. Did the district court and the court of appeals correctly conclude plaintiff-petitioner's discharge did not violate his First Amendment rights?

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STATEMENT OF THE CASE

This is a case about political loyalty. Beginning in November 1990, petitioner Frank Wagner served as bailiff to the Honorable James P. Celebrezze, an elected judge of the Cuyahoga County, Ohio, Court of Common Pleas, Division of Domestic Relations. In early 1994, Wagner began to take political action that was directly in conflict with the judge's political interests. Judge Celebrezze requested, then demanded, that Wagner curtail this detrimental political activity. When Wagner refused, he was terminated.

Wagner had been in politics before he became Judge Celebrezze's bailiff. He had been a council member for the City of Garfield Heights (a suburb of Cleveland, Ohio). He had also served on the Garfield Heights Board of Education, both as a member and president, and was a member of that Board when he was hired as Judge Celebrezze's bailiff. Upon becoming bailiff, Wagner undertook other political endeavors after first obtaining Judge Celebrezze's permission.

In January 1993, Wagner met with Judge Celebrezze to seek his approval before declaring his candidacy for Mayor of Garfield Heights. Judge Celebrezze did approve and, in fact, encouraged Wagner's candidacy. The judge's brother, Frank Celebrezze, contributed to Wagner's campaign for mayor, which pitted Wagner against Thomas Longo. Ultimately, Wagner lost to Longo by less than five percent of the vote.

After the election in November 1993, Judge Celebrezze suggested Wagner run a slate of candidates for the Garfield Heights Democratic Central Committee, an arm of the local political party. To do this, Wagner had many meetings with Judge Celebrezze, who monitored the progress of fielding candidates and encouraged Wagner to run a full slate. With Judge Celebrezze's help, Wagner organized candidates to circulate and file petitions in almost every ward and precinct in Garfield Heights for the office of the Democratic Central Committee.

In the Spring of 1994, Wagner decided to run against Rose Lovano for Ward Leader of Garfield Heights, but now-Mayor Longo (who had previously defeated Wagner in the mayoral race) did not want Wagner opposing Lovano. In another race at that time, Frank Celebrezze, Judge Celebrezze's brother, was running for judge of the Court of Appeals of the Eighth Appellate District of Cuyahoga County, Ohio.

In order to remove Wagner as a candidate against Lovano, in March 1994, Longo threatened to support another candidate against Frank Celebrezze for the appellate judgeship if Judge Celebrezze could not convince Wagner to withdraw from the Ward Leader's race and endorse Lovano. Upon realizing the adverse consequences of Wagner's political activities, Judge Celebrezze told his bailiff to make peace with Longo and attempt to get Longo to sign a card endorsing his brother Frank for the court of appeals. From April 7, 1994, through April 25, 1994, Judge Celebrezze repeatedly asked his bailiff to withdraw from the Ward Leader race and throw his support to Rose Lovano.

During this time, Wagner began surreptitiously tape recording conversations he had with the judge, and these transcriptions[1] reflect the judge's repeated attempts to convince his bailiff to support Lovano so the judge would not suffer adverse political repercussions. For instance, in a telephone conversation of April 23, 1994, Judge Celebrezze told Wagner:

> Frank, listen to me. Do not put me in the middle. And do not make a liar out of me or my brother . . . . Especially when you are dealing with an individual who has made it his business to screw me because I wouldn't fire you and give his girlfriend a job. You'd better think about that and we'll talk about it on Monday . . . .

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1. The transcriptions were never properly authenticated by Wagner; however, Judge Celebrezze did not contest their admissibility for purposes of the dispositive motion.

Nevertheless, throughout these discussions, Wagner refused to endorse Lovano (although he agreed not to run), despite his judge's concerns that Wagner's actions would detrimentally affect Frank Celebrezze's race and, ultimately, the judge's own political future.

Concerned that Wagner was not being straightforward, on May 25, 1994, Judge Celebrezze asked Wagner to sign a note addressed to Rose Lovano that read,

> Just a brief note to let you know that whatever the outcome of the next Tuesday election, I will do all in my power to see my people and I support you in remaining Ward Leader of Garfield Heights.

Wagner refused to sign the note and more discussions ensued between the judge and Wagner. Judge Celebrezze continued to explain that he did not trust Wagner and reiterated, "Unless . . . Rose Lovano gets re-elected, I got a major headache." The judge emphasized to Wagner:

> You put me in an untenable position, this is how I get out of it. Your job is, like I told you yesterday and I've told you before, your first job is to get me re-elected — not get me canned. It's just that simple. You're running, you're trying to bull shit people — now please — I'm not — I'm not stupid — you're trying to bull shit me that you ain't gonna run, I know what you're up to . . . . And I'm not gonna have it happen.

Thus, Judge Celebrezze presented Wagner with a choice: Either put in writing he would support Lovano or lose his job. That way, if Wagner refused to support Lovano, the judge could say to Mayor Longo he had done everything he could to get Wagner's support.[2] Importantly, if Wagner was no longer the

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2. The transcript of the judge's comments reads as follows:

> I got no control over you — you don't work for me any more —"Mayor I'm sorry. I did everything I could" — you go out

(Cont'd)

judge's bailiff, then Wagner's actions would no longer be viewed as a reflection of the judge's politics. So after Wagner repeatedly refused to go along with his judge's directions, Judge Celebrezze terminated him.

As the United States District Court for the Northern District of Ohio and the Sixth Circuit found, Judge Celebrezze terminated Wagner because his political affiliations worked against the judge's political interests. (A. 30; A. 9).[3] As the Sixth Circuit emphasized, Wagner's political affiliation "lay at the heart of his discharge." (A. 9). It is worth noting that both the district court and the Sixth Circuit had before it only the allegations of the complaint and supporting material submitted by petitioner Frank Wagner (in particular, a long affidavit and the unauthenticated transcripts). Presumably, Wagner presented the supplementary material to bolster his claim that he was terminated solely for engaging in politically protected speech. However, both the district court and the Sixth Circuit referenced the supplementary material to underscore that Wagner was appropriately terminated for insisting on a political affiliation that was adverse to Judge Celebrezze's.

REASONS FOR DENYING THE WRIT

"All politics is local," former Speaker of the House, Tip O'Neill once said. Recognizing the wisdom of this comment, the Sixth Circuit Court of Appeals borrowed Speaker O'Neill's aphorism in *Rice v. Ohio Dept. of Transportation,* 14 F.3d 1133, 1141 (6th Cir. 1994), as an apt description of certain public employment situations. The Sixth Circuit, following this Court in *Elrod v. Burns*, 427 U.S. 347 (1976), *Branti v. Finkel*, 445 U.S.

(Cont'd)

> and screw him [*i.e.*, Longo], if that's what you want — go do it, I'm not changing my mind[.] I told you that three times yesterday, — my brother told you that, and I told you that again last night. I told you — I think I've told you enough.

3. "A." citations refer to the material appended to Wagner's Petition for Writ of *Certiorari*.

507 (1980), and *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996), has uniformly recognized that, where politics and an employee's position are significantly intertwined, then those politics provide the appropriate factor for analyzing politically motivated, adverse employment action. This case, more than most, illustrates the paramount importance of political loyalty where local politics play a central role in the employer's public support.

I.

BECAUSE WAGNER'S POLITICAL AFFILIATION LAY AT THE HEART OF HIS DISCHARGE, THE COURTS BELOW CORRECTLY ANALYZED WAGNER'S CLAIM UNDER A POLITICAL PATRONAGE FRAMEWORK.

Ohio judges, as elected officials, are subject to the political pressures of elected office. In fact, the Sixth Circuit has specifically recognized Ohio governors may consider an individual's political party when appointing interim Ohio judges, because judges' elected status implies a political component as one job requirement. *Newman v. Voinovich*, 986 F.2d 159 (6th Cir. 1993), *cert. denied*, 509 U.S. 924 (1993). Accordingly, the Sixth Circuit has also recognized Ohio judges have a valid interest in political loyalty from their employee bailiffs, *Balogh v. Charron*, 855 F.2d 356 (6th Cir.), *reh'g denied* (1988), because this "is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518.

Nevertheless, Wagner first contends the constitutional dimensions of his discharge should not have been analyzed under *Elrod-Branti* — the *Balogh* holding notwithstanding — because (1) Judge Celebrezze was not a newly elected public official cleaning house after assuming office, and (2) Judge Celebrezze and Wagner belonged to the same political party. (Petition for Writ of *Certiorari*, p. 13) ("Petition"). But Wagner's first contention ignores one of the clear mandates of *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 74-76 (1990), that an *Elrod-Branti* analysis reaches patronage practices other than new office-holder

dismissals. Thus, in keeping with this Court's precedents, the Sixth Circuit has recognized political patronage dismissals are appropriate, even where individuals of the same political party hold different views or are only mere rivals. *See, e.g., McCloud v. Testa*, 97 F.3d 1536 (6th Cir. 1996), and Section II below. Judge Celebrezze's actions, then, must be evaluated within the *Elrod-Branti* line of cases because Wagner's politics were the reason for his discharge.

Wagner alleged and asserted by way of affidavit that, while bailiff, he was actively involved in the local political scene, first, running for and losing the Garfield Heights mayoral election, and, second, seeking the office of Garfield Heights Ward Leader of the Democratic Party. (Part of his political activities also included organizing and running a slate of candidates for the Democratic Central Committee, for the purpose of taking control of the local political party.) However, Mayor Thomas Longo supported another candidate for the Ward Leader position and expected Judge Celebrezze's support for Lovano. If Judge Celebrezze and his bailiff did not support Lovano, then Longo and his constituents would not support Judge Celebrezze's brother in his bid for an appellate court seat. Recognizing that what goes round, comes round, Judge Celebrezze told his bailiff that, if he continued in political activities ultimately contrary to the judge's interests, then Wagner could no longer serve as his bailiff.

Wagner next contends the lower court's decision has contributed to a split among the circuit courts of appeal by requiring "the patronage analysis to be applied to almost any discharge rooted in politics." (Petition, p. 11). This is not an accurate interpretation of the lower court's decision.

The Sixth Circuit expressly premised its analysis of Wagner's claim on a specific parameter: "[P]olitical patronage employees may be terminated for *purely* political reasons." (A., p. 6) (emphasis added). Based on the record — supplied entirely by Wagner himself — the Sixth Circuit found:

> Wagner was discharged because his political affiliations ran contrary to the Judge's political interests, and so his dismissal should be analyzed under the political patronage doctrine.

(A., p. 8). The Sixth Circuit emphasized, "[T]he record does not support Wagner's claim that he was fired simply for exercising his First Amendment right to refuse to speak out on a matter of public concern." *Id.* Thus, it is very clear the lower court did not hold the patronage analysis of *Elrod-Branti* must be applied to *any* discharge even tangentially connected to politics. Rather, because the lower court specifically found Wagner's discharge was the result of his political affiliations, the lower court then correctly applied the *Elrod-Branti* political patronage analysis. Wagner's inference that the Second and Seventh Circuits would reach a contrary conclusion is simply not correct.

Wagner cites *Lewis v. Cohen*, No. 97-7895, 1999 U.S. A. LEXIS 585 (2d Cir. Jan. 15, 1999), to support his contention that *Pickering v. Board of Education*, 391 U.S. 563 (1968), and its progeny provide the appropriate analytical framework for his discharge. (Petition, p. 11). The *Lewis* court held a senior policymaking employee could be terminated by the employer agency for refusing to publicly support a policy change. *Id.* at *26. In reaching its decision, the court noted part of the dismissed employee's job was to communicate with the media and the public as the official spokesperson for the agency. *Id.* at *5. Before his dismissal, the employee had publicly criticized some agency decisions and refused to endorse a newly implemented policy. *Id.* at *6-7. The Second Circuit therefore used the *Pickering* and *Connick v. Myers*, 461 U.S. 138 (1983), free speech analyses to conclude the defendant agency's interest in effective and efficient operations outweighed the dismissed employee's First Amendment interest in refusing to endorse the policy changes. *Id.* at *26. The *Lewis* court did not use an *Elrod-Branti* analysis because the *Lewis* facts involved discrete incidents of speech rather than political affiliation. *Id.* at *20. Because neither politics nor political

affiliation played *any* role in the case, the *Lewis* court correctly applied the *Pickering* analysis.

Moreover, the *Lewis* court specifically acknowledged that, under *Elrod* and *Branti*,

> consistent with the First Amendment, a policymaking employee may be discharged on the basis of political affiliation such as membership (or lack of membership) in a particular party. . . .

Id. at *20. So, contrary to Wagner's inference, the *Lewis* court did not advocate a *Pickering* analysis when political affiliation is the reason for discharge; the court simply upheld the Second Circuit's rule that,

> [w]here the evidence shows that the employer discharged a policymaker solely for speaking out on matters of public concern, and . . . the *policymaker's political beliefs played no role* in the employer's decision, Elrod is inapplicable and Pickering must be applied. . . .

Id. at *20-21 (quoting *McEvoy v. Spencer*, 124 F.3d 92, 101 (2d Cir. 1997)) (emphasis added). In contrast to *Lewis*, the lower court in this case found Wagner was discharged specifically because of his political beliefs. (A., p. 8). Therefore, the Second Circuit's *Pickering* analysis in *Lewis* is immaterial to this case which clearly involves political affiliation.

Wagner also cites the Seventh Circuit case of *Marshall v. Porter County Plan Commission*, 32 F.3d 1215 (7th Cir. 1994), *cert. denied*, 513 U.S. 1155 (1995). In *Marshall,* the court used a *Pickering-Connick* analysis to determine whether the plaintiff Marshall's discharge was proper. *Id.* at 1219. (Marshall, a policymaker, was discharged for speaking about improprieties of her office. *Id.)* Similar to the Seventh Circuit in *Lewis,* but unlike the case before this Court, the evidence in *Marshall* did not suggest

Marshall was terminated because of partisan politics. *Id.* at 1221. In fact, in *Marshall*, the employer did not even argue Marshall was discharged for her political affiliations, or for not supporting a certain candidate. *Id.* However, the Seventh Circuit remarked that it would apply an *Elrod-Branti* analysis "when the plaintiff's politics are implicated in the discharge. . . ." *Id.* But because the *Marshall* facts did not raise political affiliation concerns, the court properly applied the *Pickering* analysis to the *Marshall* facts. Therefore, neither *Marshall* nor *Lewis* is useful in this case because Wagner's termination unquestionably involved political affiliation. What is clear from the *Lewis* and *Marshall* cases is that the Second and Seventh Circuits, respectively, do in fact use the *Elrod-Branti* analysis to determine if a discharge is proper, when the discharge is based upon political affiliations.

Additionally, Wagner cites a Sixth Circuit case, *Rahn v. Drake Center*, 31 F.3d 407, 411 (6th Cir. 1994), *cert. denied*, 515 U.S. 1142 (1995), to support his contention that his claim should be analyzed under *Pickering*. (Petition, p. 15). However, *Rahn* is no more helpful than *Lewis* or *Marshall*, because, again, political affiliation played no part in that plaintiff's termination.

The question in *Rahn* was whether the plaintiff was discharged for unauthorized absences or in retaliation for her writing a press release publicly criticizing her employer. *Id.* at 409-11. The court determined a two-step analysis was appropriate to decide whether the plaintiff was terminated for exercising her First Amendment right. Initially, the court had to determine whether the speech (*i.e.*, the press release) was on a matter of public concern. *Id.* at 411. If the speech was found to relate to a matter of public concern, then the court would conduct a *Pickering* balancing test. *Id.* Because political affiliation played absolutely no role in Rahn's termination, the court appropriately did not consider an *Elrod-Branti* analysis. Interesting as this case may be, it in no way supports Wagner's position that *Pickering* is the appropriate analytical framework for his case — where political affiliation was at the heart of his discharge.

The Sixth Circuit's decision below, therefore, solidly premised on the facts of this case, neither contradicts this Court's or the Sixth Circuit's previous decisions, nor contributes to a purported split among the circuit courts of appeal, despite Wagner's sounding the alarm. (Petition, p. 11). As the Sixth Circuit described:

> The record does not support Wagner's claim that he was fired simply for exercising his First Amendment right to refuse to speak out on a matter of public concern. Wagner's limited focus on his refusal to sign the letter supporting Lovano for Party Ward Leader misrepresents the record. Judge Celebrezze terminated Wagner because he believed that they no longer enjoyed the requisite commonality of political purpose and support, as ultimately evidenced by Wagner's refusal to sign the letter.

(A., p. 8). In other words, the Sixth Circuit found Wagner's refusal to sign a note endorsing Rose Lovano was but one facet of a series of political interactions leading up to his termination. Thus, the district court and the court of appeals correctly analyzed Wagner's termination under the *Elrod-Branti* framework.

II.

BECAUSE "POLITICAL AFFILIATION" APPLIES TO THE KIND OF POLITICAL DIFFERENCES IN THIS CASE, AND BECAUSE WAGNER WAS A CONFIDENTIAL EMPLOYEE, THE COURTS BELOW CORRECTLY CONCLUDED JUDGE CELEBREZZE COULD TERMINATE HIS BAILIFF FOR ACTIONS DETRIMENTAL TO THE JUDGE'S POLITICAL INTERESTS.

Applying the *Branti* standard, in 1988, the Sixth Circuit Court of Appeals held a judge could discharge his bailiff for purely political reasons because the bailiff was a confidential employee. *Balogh v. Charron*, 855 F.2d 356 (6th Cir.), *reh'g denied* (1988). The Sixth Circuit noted bailiffs work in chambers and are assigned

to only one judge as court officer and general assistant. Bailiffs normally handle sensitive and non-public information about cases of a confidential nature, so the judge must be able to rely on the confidentiality of the relationship with his bailiff. Thus, the Sixth Circuit held it was not a violation of First Amendment rights for a judge to terminate his bailiff's employment because of the bailiff's political affiliation.[4] *Id.* at 356.

In *Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990), the Sixth Circuit elaborated on its definition of "political affiliation," emphasizing political affiliation "has been understood to apply to political differences of any kind, not merely differences in party membership." *Id.* at 153, fn. 4. Finding a city attorney did not enjoy First Amendment protection against politically motivated dismissal, the *Williams* court defined "political affiliation" to include "commonality of political purpose and support, not [just] political party membership." *Id.*

Two years later, the Sixth Circuit again visited the question of politically motivated termination and held a new mayor's politically motivated refusal to rehire the old mayor's secretary did not violate the secretary's First Amendment rights. *Faughender v. City of North Olmsted, Ohio*, 927 F.2d 909, 913-14 (6th Cir. 1991). Again, the Sixth Circuit employed a broad definition of what constitutes permissible politically motivated dismissals when it noted:

> Any reference to "political motivations" should not be read as synonymous with partisan political motivations. As we noted in *Williams*, "the reasoning of the Supreme Court in [*Branti*] has been understood to apply to political differences of any kind, not merely differences in party membership. . . ." [*citation omitted*] The political motivations underlying this case are personal, not partisan, but this does not remove them from examination under *Branti*.

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4. In *Balogh*, the bailiff had supported the judge's political opponent.

Id. at 914, fn. 2. The "personal political differences" of the *Faughender* case are similar to Wagner's claims against Judge Celebrezze, as Ms. Faughender lost her job because of the personal relationships of the political officers involved.[5]

The Sixth Circuit has continued to hold a government employee can be discharged because of his or her political affiliation if political affiliation is an appropriate requirement for the effective performance of the public office involved. *McCloud v. Testa*, 97 F.3d 1536 (6th Cir. 1996); *Mumford v. Zieba*, 4 F.3d 429 (6th Cir. 1993), *cert. denied*, *Mumford v. Basinski*, __ U.S. __, 118 S. Ct. 298 (1997). Likewise, the Sixth Circuit has continued to hold "political affiliations" should be broadly construed to mean "commonality of political purpose and support, not solely political party membership." *Id.* at 433 fn. 9.

Throughout this litigation, Wagner's fall-back argument has been that, even if *Elrod* and *Branti* apply, based on his actual responsibilities he could not be discharged for political patronage reasons because he was not a confidential employee. However,

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5. While working first as secretary to the safety director of North Olmsted, the safety director asked Ms. Faughender to take the job of secretary to the mayor. As the Sixth Circuit noted,

> This job became available because then-Mayor Robert Swietyniowski . . . was marrying his prior secretary, an act which caused much commotion in North Olmsted and ultimately caused the mayor to lose his bid for re-election in 1985. Faughender was initially reluctant to enter into this squall, but finally took the job.

Id. at 910-11. Mr. Swietyniowski lost his bid for re-election in the Democratic primary, and the ensuing Democratic nominee lost to the ultimate winner, Republican Yvonne Petragic. New Mayor Petragic in part decided not to rehire Ms. Faughender because she was friends with the old mayor's new wife. The Sixth Circuit therefore found Ms. Faughender was not rehired for politically motivated reasons, but that, as a confidential employee, these reasons were permissible.

the Sixth Circuit has held as a matter of law that bailiffs, as a category, are confidential employees:

> We agree with the decision of District Judge Avern Cohn . . . , that **the bailiff to the judge, like an administrative or legislative aide to a legislator, is a confidential employee**. As a judicial aide, this confidential relationship arises because he handles sensitive communications for the judge, acts as his bodyguard and may discuss and learn about the outcome of cases pending before the judge before the decision is announced to the public.

Balogh, 855 F.2d at 356 (*emphasis added*). In *Balogh*, then, the Sixth Circuit created a precedent binding to a classification of all bailiffs, including Wagner in this case.

Moreover, Wagner's job duties — as described by him alone — indicate he engaged in the kind of activities contemplated by the *Balogh* court. Wagner attested he administered Judge Celebrezze's docket, scheduled hearings and trials, set up attorney-judge conferences, handled calls and "otherwise screened persons wishing to make contact with the Judge," opened and closed court, and swore in witnesses. From this description alone, it is evident Wagner was privy to the particulars of proceedings and information not available to the general public.[6] For example, through Wagner, parties sought hearings on motions. Thus, as Judge Celebrezze's bailiff, Wagner knew when a party needed to schedule an emergency (versus a routine) hearing, the nature of the controversy, and other matters not generally brought to the public's attention. Additionally, as the person who screened Judge Celebrezze's calls, he knew to whom the judge wished to speak, to whom he did not, and otherwise how to direct the judge's communication.

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6. This Court can judicially notice that, as a Common Pleas Domestic Relations judge, Judge Celebrezze presided over matters involving some of the most sensitive kind of litigation.

Thus, the Sixth Circuit correctly concluded Judge Celebrezze did not violate Wagner's constitutional rights when he terminated Wagner because he was a confidential employee for whom political loyalty was a legitimate requirement. In arguing to the contrary, Wagner suggests the lower courts should have asked whether Wagner's activities would have interfered with his or the judge's discharge of their public duties. (Petition, p. 17). He contends it "should have been self-evident to the lower courts" the judge's demands[7] "could never be deemed 'an appropriate requirement for the effective performance of [Domestic Relations Court].' "[8] (Petition, pp. 17-18). However, the Sixth Circuit has specifically held otherwise.

In *Mumford v. Zieba*, 4 F.3d at 434, the Sixth Circuit expressly recognized that animosities arising from political opposition can result in the inefficient operation of government. As the transcripts reflect, Wagner's continued refusal to back off from his personal political pursuits created tremendous friction with his judge. Judge Celebrezze's description of his concerns — that he did not want to be put in the middle of a political tug-of-war, that he did not want to lose political support from Mayor Longo and others — reflects he discharged his bailiff for reasons directly related to the eroding trust between the judge and his bailiff. Because their relationship was a close, confidential one, any distrust or personal animosity would significantly impair the efficient operation of the court.

The lower courts correctly gave deference to Judge Celebrezze's response to his bailiff's actions, based on the

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7. Again, Wagner incorrectly focuses only on the Lovano note (*i.e.*, the job requirement was "forcing Wagner to sign a statement vocalizing support for a political candidate in a suburban ward leader race. . . ."). (Petition, p. 17).

8. Because court bailiffs have already been designated confidential employees, the Sixth Circuit has already asked and answered the question.

consequences the judge perceived.[9] Thus, it is specious for Wagner to assert the lower courts should not have found Wagner's political loyalty was an appropriate requirement for the effective performance of the court. The district court and the court of appeals correctly concluded Wagner's disloyalty caused his termination, and his termination was not a violation of his First Amendment rights.

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9. In 1994, this Court acknowledged that governmental employers must be allowed to make employment decisions they feel are in their best interests and that a court, in reviewing such a decision, must apply the law to the facts as the employer thought them to be if the court finds the employer's conclusions were reasonable. *Waters v. Churchill*, 511 U.S. 661 (1994).

CONCLUSION

Wagner asks this Court to consider whether the lower courts should have applied the familiar "balancing of interests" test of *Pickering* and *Connick* to his discharge. However, the factual record before this Court shows the lower courts did not misconstrue or overemphasize the political nature of Wagner's employment and termination. Consequently, despite Wagner's attempts to paint the situation differently, the record as a whole shows the Sixth Circuit correctly applied *Elrod-Branti* and their progeny, and correctly concluded Judge Celebrezze was well within his rights when he terminated Wagner for his political action.

As this case does not present any unsettled question of constitutional law, respondent Judge James P. Celebrezze respectfully requests petitioner Frank Wagner's Petition for Writ of *Certiorari* be denied.

Respectfully submitted,

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